STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL SANDERSON and AMY SANDERSON, Plaintiffs-Appellants, v CAHILL CONSTRUCTION COMPANY, Defendant, and SKYLINE CONCRETE FLOOR CORPORATION, Defendant-Appellee.	UNPUBLISHED April 5, 2011 No. 294939 Macomb Circuit Court LC No. 2008-003373-NO

Before: K. F. KELLY, P.J., and GLEICHER and STEPHENS, JJ.

K. F. KELLY, J. *(dissenting.)*

I respectfully dissent from my colleagues' conclusion that the trial court erred in granting summary disposition in favor of defendant, Skyline Concrete Floor Corporation, in this negligence action. In my view, the trial court correctly applied *Fultz v Union Commerce Assoc,* 470 Mich 460; 683 NW2d 587 (2004), and correctly concluded that defendant owed no separate and distinct duty to plaintiff, Michael Sanderson, outside its contractual duties. As a result, I would affirm.

We review de novo the trial court's decision on a motion for summary disposition. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). Summary disposition under MCR 2.116(C)(10)[1] is appropriate where there is "no genuine issue as to any material fact, and the

[1] Although defendant's motion was also brought under MCR 2.116(C)(8), the trial court went beyond the pleadings to decide the motion. Accordingly, analysis under the standard of review (continued…)

moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10); *Lanigan v Huron Valley Hosp, Inc*, 282 Mich App 558, 563; 766 NW2d 896 (2009). In evaluating a motion for summary disposition brought under this subsection, we consider "the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties[,]" MCR 2.116(G)(5) "in the light most favorable to the nonmoving party[,]" *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). If, upon review of such evidence, reasonable minds might differ as to any material fact, the court must deny the motion for summary disposition. *Lanigan*, 282 Mich App at 569. Also, whether one person owes a duty to another is a question of law, which this Court reviews de novo. *Zaremba Equipment, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 26; 761 NW2d 151 (2008).

To state a prima facie case of negligence, a plaintiff must prove: the existence of a duty, breach of that duty, causation, and damages. *Stephens v Dixon*, 449 Mich 531, 539; 536 NW2d 755 (1995). "A duty of care may arise from a statute, a contractual relationship, or by operation of the common law, which imposes an obligation to use due care or to act so as not to unreasonably endanger other persons[.]" *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009). In general, a subcontractor has no duty to ensure the safety of employees of other subcontractors at the worksite. *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460, 466; 708 NW2d 448 (2005). Nonetheless, a subcontractor retains its general common law duty to act in a manner that does not cause unreasonable danger to the person or property of others. *Id.*

A third party to a contract cannot recover for negligence based on an alleged breach of the contract unless there is a violation of a legal duty that is "separate and distinct" from the contractual obligation. *Fultz*, 470 Mich at 467. "If no independent duty exists, no tort action based on a contract with lie." *Id.*

In *Fultz*, the plaintiff was injured when she slipped and fell on ice in a parking lot. *Fultz*, 470 Mich at 462. The owners of the lot had contracted with a company to provide snow removal and salting services. *Id.* When the plaintiff fell, the lot had not been plowed or salted in over fourteen hours. *Id.* The plaintiff brought a claim for negligence against the lot owner and the contractor. *Id.* Upon review, the Michigan Supreme Court noted that the plaintiff had only alleged that the contractor had breached its contract with the lot owner by failing to plow and salt the lot. *Id.* at 468. The plaintiff had not alleged an independent duty that the contractor owed to her outside of what was required in the contract. *Id.* Accordingly, the Court concluded that the plaintiff could not establish the existence of a duty to support her negligence claim. *Id.*

The issue in this case, therefore, is whether defendant owed a duty to plaintiffs that was separate and distinct from its obligation under the contract with Cahill. Defendant allegedly left exposed holes in the concrete floor it had installed. The Court must look at the terms of the contract to determine whether defendant's action was covered under the contract. *Ghaffari*, 268 Mich App at 465. In this case, the contract itself does not specifically describe a requirement for

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for MCR 2.116(C)(10) is appropriate. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008).

creating or safeguarding holes surrounding plumbing fixtures. It does, however, contain provisions requiring defendant to "fully comply with all applicable federal, state and local codes, regulations, etc. ... in its performance" of the contract. The contract further addresses accident prevention under OSHA (Occupational Safety & Health Act, 29 USC 651 *et seq*.) regulations, and states that defendant "agrees to conduct the performance of the Work and maintain the condition of the premises under its control in such manner or condition so as to prevent injuries to workmen employed by it or others on the project." Defendant agreed to "comply with all Federal, State, Municipal and local laws, ordinances, rules, regulations, codes, standards, orders, notices and requirements concerning safety as shall be applicable to the Subcontract Work[.]"

Regarding covers for holes in floors, the Michigan Occupational Safety and Health Act ("MIOSHA"), MCL 408.1001 *et seq*., standards require:

> Each employee on a walking/working surface shall be protected from tripping in or stepping into or through holes (including skylights) by covers. [29 CFR 1926.501(b)(4)(ii), as adopted by Mich Admin Code R 408.44502.]

Other regulations require that such covers be capable of supporting twice the weight of employees, equipment and materials that might be imposed on the cover, that covers be installed so as to prevent accidental displacement, and that covers be color-coded or marked with the word "Hole" or "Cover" to provide warning of the hazard. 29 CFR 1926.502(i), as adopted by Mich Admin Code R 408.44502.

Given the specific reference to and incorporation of safety requirements in the contract, it follows that Cahill would have had a basis to claim a breach of contract against defendant had such requirements not been followed. Defendant had a contractual obligation to protect against floor openings such as those surrounding the exposed pipes in this case. Because the essence of plaintiffs' claim is that defendant failed to construct and maintain the condition of the floor in a manner so as to prevent injuries to plaintiff, its negligence in failing to do so cannot give rise to a duty "separate and distinct" from its obligation under its contract with Cahill. See *Fultz*, 470 Mich at 470 (in absence of duty separate and distinct from original contract, liability for injuries to third persons will not attach).

In any event, even if I were to agree with the majority that plaintiffs had demonstrated that defendant owed them a duty independent of the contract, there is no genuine issue of material fact that defendant breached any such duty. Defendant laid the concrete three to four weeks before plaintiff was injured. Pursuant to the plans, defendant left holes in the concrete, to be "boxed out" by a completely different subcontractor, and covered those holes with plywood. Plaintiffs provided no evidence that it was defendant that failed to adequately cover the holes. As a result, regardless of whether defendant had a duty independent of the contract, plaintiffs failed to demonstrate that defendant breached that duty and was negligent.

I would affirm.

/s/ Kirsten Frank Kelly